

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GOLDEN GATE SHOPPING CENTER,  
LLC,

Plaintiff,

Case No: 18-000395-CB  
HON. BRIAN R. SULLIVAN

-vs-

GOLDEN GATE QUALITY CLEANERS,  
INC., a Michigan corporation, FLORA ROSSI  
Individually, SENTINEL INSURANCE COMPANY,  
LIMITED d/b/a THE HARTFORD FINANCIAL  
SERVICES GROUP, INC., a/k/a THE HARTFORD,  
a Foreign Insurance Company, A.M. O'MALLEY  
INSURANCE, P.C., a Michigan Professional  
Corporation and AUSTIN MICHAEL O'MALLEY, an  
Individual,

Defendants.

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**ORDER GRANTING DEFENDANT, SENTINEL'S,  
MOTION FOR SUMMARY DISPOSITION**

At a session of said Court, held in the City  
County Building, City of Detroit, County of  
Wayne, State of Michigan, on  
9/23/2019

PRESENT: HONORABLE BRIAN R. SULLIVAN

Plaintiff Golden Gate Shopping Center, LLC (Golden Gate) sued Golden Gate dry  
cleaners (cleaners), its owner (Rossi), several insurance companies (Hartford and Sentinel)  
and an insurance agent (O'Malley) and his insurance PC for damage to its land alleged to  
be caused by chemicals discharged by the dry cleaners into the soil during its operation.

The chemicals were discharged into the ground owned by plaintiff and caused environmental contamination. Defendant, Sentinel Insurance Company, Limited, d/b/a The Hartford Financial Services Group, Inc. (Sentinel) insured plaintiff (an additional insured), cleaners and Rossi, the owner. Golden Gate directly sued Sentinel for breach of and insurance contract alleging it is an additional insured on Sentinel's insurance policy; the policy covers cleaners business; the cleaners polluted its land; so Golden Gate should get money damages for the cleaner's pollution of its land from Sentinel.

Sentinel moved for summary disposition of plaintiff's complaint on several grounds:

1. coverage issues are not properly part of the principal case; 2. The insurer Sentinel (Hartford) cannot legally be named as a party; 3. Golden Gate is not entitled to damages under the policy as an additional insured; and 4. Plaintiff's recovery from Sentinel is precluded by the pollution exclusion in the policy. Plaintiff opposed the motion.

The court grants Sentinel's motion for summary disposition under MCR 2.116(C)(8) and concludes:

1. A declaration action must be brought in a separate suit;
2. Golden Gate can't sue Sentinel as a party in this case;
3. Golden Gate can't recover as an additional named insured for the actions of the cleaners; and
4. The policy excludes insurance coverage for pollution to the land.

## **FACTS**

Golden Gate Shopping Center filed a complaint against Golden Gate dry cleaners (cleaners) who leased the property from it, the owner of that cleaners (Rossi), the company which insured the cleaners, Sentinel Insurance Company (Hartford) and the agent and his company who sold the insurance policy to cleaners, O'Malley and O'Malley, P.C. Golden Gate seeks to recover for contamination to its real property by the dry cleaners because it is alleged to have discharged dry cleaning chemicals, a pollutant, into the soil over its years of operation at the site.

The pertinent parts of the complaint allege that from about May 1, 2005 through 2017 the cleaners agreed to name Golden Gate as an additional insured on its commercial premises liability insurance policy issued by Sentinel. Sentinel obligated itself under that policy to pay for losses incurred as a result of certain damage to its property. Plaintiffs allege the dry cleaners released harmful pollution into the soil and all defendants, including Sentinel, should pay for the cleanup of that contamination.

## **STANDARD OF REVIEW**

MCR 2.116(C)(8) provides:

C. Grounds. The motion may be based on one or more of these grounds, and must specify the grounds on which it is based:

(8) The opposing party has failed to state a claim on which relief can be

granted.

(4) The grounds listed in sub-rule (C)(8),(9) and (10) may be raised at any time unless the period in which to file the dispositive motion is established under a scheduling order entered pursuant to MCR 2.401. ... MCR 2.116(C)(8) tests the legal sufficiency of a claim. *Maiden v Rozwood*, 461 Mich 109, 120 (1999).

A court may grant summary disposition pursuant to MCR 2.116(C)(8) if “the opposing party has failed to state a claim upon which relief can be granted. *Dalley v Dykema, Gosset*, 287 Mich App 296 (2010). A motion brought pursuant to sub-rule (C)(8) tests the legal sufficiency of the complaint. All well plead allegations are taken as true. The court must construe them in a light most favorable to the non-moving party. *Dalley*, at 304, 305. If the complaint fails to state a cause of action the motion is granted. *Maiden v Rozwood*, 461 Mich 109 (1999).

A motion brought pursuant to MCR 2.116(C)(4) is granted when a trial court lacks subject matter jurisdiction over an action. *Cairns v City of East Lansing*, 275 Mich App 102, 107 (2007). When a court reviews a motion pursuant to MCR 2.116(C)(4), the court must determine whether the pleadings demonstrate the defendant is entitled to judgment as a matter of law or, whether proofs show there is no genuine issue as to any material fact.

## **CONTRACT**

Under Michigan law insurance policies are subject to the same rules of contract construction that applies to other contracts. See *Rory v Continental Insurance Company*, 473 Mich 457 (2005). Ordinary rules of contract interpretation apply to an interpretation of insurance contracts. See *McGrath v Allstate Insurance Company*, 290 Mich App 434, 439 (2010). The language of an insurance contract should be read as a whole.

Insurance policies are subject to the same rules of contract construction that apply to other contracts. *Rory v Continental Insurance Company*, 473 Mich 457, 461 (2005). In construing an insurance contract the court must construe and apply unambiguous contract provisions as they are written. *Rory*, 473 Mich at 461.

The primary goal of the interpretation of a contract is to ascertain the intent and give effect to that intent, reasonably inferred from the words expressed in the contract. *Miller-Davis v Ahrens Constr., Inc.*, 495 Mich 161, 174 (2019). The court must construe the contract and give effect to every word, clause and phrase. If the statutory language is unambiguous the legislature is presumed to have intended the meaning expressed. When the policy language is clear and unambiguous the court must enforce the language of the contract. *G.C.Timmis and Company v Guardian Alarm Company*, 468 Mich 416, 420 (2003); *Cairns*, 275 Mich App at 107. A court must construe and apply an unambiguous contract as written. *Rory, supra*.

A word or term is not ambiguous merely because it can be construed in different

ways. See *Koontz v Ameritech Services, Inc.*, 466 Mich 304, 312 (2002). A word is given meaning based on the context of surrounding words, *Koontz*, 466 Mich at 312. Words and phrases contained in a statute are read in the context of the act as a whole to harmonize the meanings and to give effect to the entire act. *Timmis*, 468 Mich at 421; *Cairns*, 275 Mich App at 107. *Barton/Spencer v Farm Bureau Life Insurance Company of Michigan*, 500 Mich 32, 40 (2017). A contract can be ambiguous if the terms are equally susceptible to more than a single meaning or its provisions irreconcilably conflict with each other. *Klapp*, 468 Mich at 467. The court does not create on ambiguities when these are clear terms in the contract. *Kendzierski v Macomb County*, 503 Mich 296, 310-311(2019).

An ambiguity is to be construed against the insurer. An insurance contract is ambiguous if its provisions are subject to more than one meaning. An insurance contract is not ambiguous merely because a term is not defined in the contract. If a term is not defined then it must be given its plain and ordinary meaning, which can be resolved by consulting to a dictionary.

The interpretation of a contract is done to glean the intent of the parties and enforce the plain terms of the contract. *Davis v LaFontaine Motors, Inc.*, 271 Mich App 68, 73 (2006). If no reasonable person could dispute the meaning of the plain language of the contract the court must enforce the contractual language as written. *Rory v Continental Insurance Company*, 473 Mich 457, 468 (2005). If a contract is unambiguous the court interprets it as a matter of law and enforces it as written. *Klapp v United Insurance Group*

*Agency, Inc.*, 468 Mich 459, 463 (2003). *In re Smith Trust*, 480 Mich 19, 24 (2008).

The policy application, the declaration page of the policy as well as the policy itself constitutes the contract the court is to construe. *Royal Property Group, LLC v Prime Insurance Syndicate, Inc.*, 267 Mich App 708, 715 (2015).

The elements of a contract are:

1. Parties competent to contract.
2. A proper subject matter.
3. Legal consideration.
4. Mutuality of agreement.
5. Mutuality of obligation. *AFT Mich v Michigan*, 497 Mich 197, 235 (2015); *Bank of America, NA v First American Title Insurance Company*, 499 Mich 79 (2015).

Parties to a contract are free to modify or waive any rights and duties established by their contract. *Quality Products and Concepts Company v Nagle Precision, Inc.*, 469 Mich 362, 372 (2003). Such modification or waiver can be established by clear and convincing evidence that the parties mutually agreed to a modification or waiver of their contract. *Quality Products, supra*. However, no party must unilaterally alter an existing bilateral contract. The party alleging such modification or waiver must establish it was the mutual intention of the parties to waive or modify that contract. This is a necessary requirement of mutual assent. *Quality Products, supra*.

## SUMMARY DISPOSITION

Sentinel asserts four grounds for summary disposition:

1. Plaintiff is not an additional insured entitled to recover damages from another of its insureds;
2. It is not a proper defendant to this action;
3. The policy does not cover pollution, as it is excluded; and
4. A declaratory action is separate from the primary suit.

1. Sentinel asserts plaintiff is not an additional insured under the policy and has no direct claim against it.

The Sentinel insurance policies for Golden Gate Cleaners for the years 2014 through 2018 are attached as an exhibit to defendant's motion. Plaintiff reference them in its complaint and they are properly reviewed within the scope of MCR 2.116(C)(8). See also MCR 2.116(3)(F); *Laurel Wood Apartments v Roumayah*, 274 Mich App 631, 635 (2007).

The insurance policy covers business liability coverage and property coverage. The policy obligates Sentinel to indemnify an insured for money paid due to injury or damage. Plaintiff has not been determined to be legally obligated to pay damages to anyone because of any bodily injury or property damage. Rather, plaintiff claims it has been



damaged by the cleaners and seeks coverage from Sentinel the harm its tenant caused to it. That is plaintiff directly sued Sentinel for cleaners acts of pollution seeking it be paid under a contract in which it is named as an insured to protect it from another's suit.

The plaintiff has not been determined to have a legal obligation to anyone due to property damage it caused. That is, no third party has sued plaintiff for damages plaintiff is obligated to pay. There has not been, and cannot be, a determination plaintiff is obligated to another person or party for clean-up of the contamination of its tenant. See *Coil Andizers, Inc. v Wolverine Insurance Company*, 120 Mich App 118, 122 (1982). Plaintiff cannot recover damages under this scenario as a named insured. That listing is meant to pay another (named insured) who plaintiff may legally be obligated to pay. Defendant's motion on this ground is granted.

## 2. Insurer not a party.

Sentinel also asserts summary disposition is appropriate under MCR 2.116(C)(8) and (C)(4) pursuant to MCL 500.3030. MCL 500.3030 provides:

In the original action brought by the injured person ... the insurer shall not be made or joined as a party defendant, nor, except as otherwise provided by law, shall any reference whatever be made to such insurer to the question of carrying of such insurance during the course of trial.

The shopping center sued Sentinel under the theory it would be able to recover under the policy for the tenant's negligence. Suit against Sentinel in this case is precluded by statute. See *Benmark v Steffen*, 374 Mich 155, 164 (1965). Golden Gate's cause of

action against Sentinel is contrary to statute. See i.e. *Allstate Insurance Company*, (docket number 185862, 1996 unpublished opinion Court of Appeals). Summary disposition is granted on this ground, without prejudice (see ground 4 below).

### 3. Pollution Exclusion.

Sentinel asserts there can be no judicial determination it must pay plaintiff under the complaint because the policy contains a pollution exclusion for property damage, which arises out of the discharge, migration, release or escape of pollutants at any premises occupied by, or rented to any insured. Plaintiff's complaint specifically alleges that the cleaners discharged a pollutant, dry cleaning solvent tetrachloroethane (PCE) and trichloroethane (TCE), into land rented to cleaners and owned by plaintiff.

The plaintiff's allegation in the complaint that the cleaners discharged the pollutants into the soil owned by plaintiff precludes coverage by specific exclusion in the Sentinel policy. See *McKusick v Travelers Indemnity Company*, 246 Mich App 329, 333 (2001). Plaintiffs cannot recover due to the exclusion in the policy.

There is a special property coverage provision under the insurance policy which applies to a first party insurance benefit. However, that benefit is available only to the party that isn't insured who sues plaintiff for damages. Golden Gate does not qualify for special property coverage under the policy.

Finally, there is an additional insured endorsement of the 2017-2018 which lists Golden Gate as an additional insured under manager/lessor for business liability coverage but it does not include the special property coverage. 'Land' is specifically excluded in the provision of the policy that states "property not covered;" which states "covered property does not include ... land (including land in which the property is located)." Summary disposition on this ground is granted.

4. Declaratory action.

Litigation of a coverage issue in a subsequent (declaration) action against insurance companies is available in the event the policy could be triggered. *Security Insurance Company of Hartford v Daniels*, 70 Mich App 100 (1976). It is not available in the same suit filed for damages. Summary disposition is granted on this ground without prejudice.

For all the above reasons defendant Sentinel's motion for summary disposition is granted; and

IT IS SO ORDERED.

/s/ Brian R. Sullivan 9/23/2019  
BRIAN R. SULLIVAN  
Circuit Court Judge

ISSUED: